No. 86-980

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

DUKE B. KELLY,

Petitioner,

vs.

WAUCONDA PARK DISTRICT, a local Governmental Agency of the State of Illinois,

Respondent.

On Petition For A Writ Of Certiorari To The United States Supreme Court From The Seventh Circuit Court Of Appeals

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Congress intended that state and local government employers with less than twenty employees should be subject to the prohibitions of the Age Discrimination in Employment Act, 29 U.S.C. § 630(b).

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STATEMENT OF THE CASE

In this case, both the district court and the court of appeals held that the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621, *et seq.*, applies to state and local government employers, just as it applies to private

employers, only if they have 20 or more employees. *Kelly* v. *Wauconda Park District*, 612 F.Supp. 1201 (N.D. Ill. 1985), *aff'd* 801 F.2d 269 (7th Cir. 1985).

The Applicable Statutory Provision

Under the ADEA, "employers" are defined in 29 U.S.C. § 630(a) and (b):

> (a) The term "person" means one or more individuals, partnerships, associations, labor organizations, corporations, business trusts, legal representatives, or any organized group of persons.
>
> (b) The term "employer" means a person engaged in an industry affecting commerce who has 20 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year. . . . The term [employer] also means (1) any agent of such a person, and (2) a State or political subdivision of a State or any agency or instrumentality of a State or a political subdivision of a State. . . .

When originally enacted in 1967, the ADEA specifically exempted state and local government employers. The second sentence of the original § 630(b) thus provided that "[t]he term [employer] also means any agent of such a person but does not include. . . . a State or a political subdivision of a State." In 1974, Congress amended the definition of "employer" in § 630(b) to include government employers within the coverage of the ADEA.

The Uncontested Facts

The facts of this case, as reported by the court of appeals, are not in dispute. 801 F.2d 269, 270 (7th Cir. 1986).

Respondent Wauconda Park District (the "Park District") is a totally independent body of local government,

which is located in the Village of Wauconda, a town of 5,700 people in northern Illinois. The Park District is governed solely by the elected members of a Board of Commissioners who serve without pay. (R. 11, Ex. A, ¶ 3.)* The Park District subsists solely upon the revenues gained from a special, local property tax and other "program revenues," which the Park District generates from the programs and services it provides. (*Id.*, ¶ 4.) In 1982—the year in which petitioner allegedly resigned from his job with the Park District—the Park District was comprised of less than 18 acres of land and had a total budget of approximately $120,000. (*Id.*)

Under this budget, the Park District necessarily was constrained to a very small staff of employees. (*Id.*, ¶ 5.) In fact, during the applicable time period, the Park District had only one full-time, year-round employee, who served as a Director of Parks and Recreation and Secretary to the Board of Commissioners. (*Id.*) In each of the calendar years 1981 and 1982, the Park District employed a total of 13 individuals. (R. 11, Ex. B, ¶ 4.) Only two of these employees worked five days in each of 20 or more weeks during 1981 and 1982. (*Id.*) In fact, the Park District never has had more than three employees who have worked five days in each of 20 or more weeks in any calendar year from 1981 to 1985. (*Id.*, ¶ 3.)

The Decision Of The Court Of Appeals

The district court granted the Park District's motion to dismiss on the ground that the ADEA does not apply to government employers with less than 20 employees.

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* "R. ___" refers to the entry in the Record on Appeal which was filed in the court of appeals.

612 F.Supp. 1201 (N.D. Ill. 1985). The court of appeals affirmed. 801 F.2d 269 (7th Cir. 1986).

At the outset, the court of appeals found § 630(b) to be ambiguous. While petitioner asserted that the language of the statute applies to all state and local government employers regardless of size, the Park District contended that the second sentence of § 630(b) simply makes clear that states and their political subdivisions now are to be included in the term "employer," as defined in the first sentence of § 630(b), which limits the ADEA's reach to employers of 20 or more individuals. 801 F.2d at 270-71. Faced with these "reasonable, but conflicting, interpretations of the plain meaning of section 630(b)," the court of appeals reviewed the legislative history of the 1974 amendment to the ADEA. 801 F.2d at 271.

The court of appeals found three different types of evidence to support its ruling that the ADEA's 20-employee minimum applies to public and private employers alike.

First, the court reviewed the history of the 1974 amendment to the ADEA itself. The ADEA plainly is limited to employers of 20 or more in the private sector, and the court of appeals found substantial evidence that Congress extended the ADEA so that all employers, both public and private, would be governed by "one set of rules." 801 F.2d at 271-72, *quoting from* Special Committee on Aging, U.S. Senate, *Improving the Age Discrimination Law* at 17 (1973).

In addition, the court of appeals also found that Congress modeled its 1974 extension of the ADEA into the public sector directly on its earlier, parallel extension of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, *et seq.*, which prohibits employment discrimination based on race, sex, or religion. Under the Title VII

provision which Congress used as a model for the amendment to the ADEA, the minimum employee requirement plainly applies to government and private employers alike. 801 F.2d at 271.

Finally, the court examined the anomalous results which would arise from applying the ADEA to all government employers regardless of size. 801 F.2d at 273. For example, if the ADEA were to apply to government employers regardless of size, then the ADEA would have far broader coverage in the public sector than Title VII. This would be anomalous, for, as the court of appeals noted:

> Congress has historically viewed the problems addressed by Title VII, racial, sexual, and religious discrimination, to be more serious than the problem of age discrimination. Congress enacted Title VII first, applied it to the public sector first, and it has always had a lower minimum-employee threshold than the ADEA.

801 F.2d at 273 (citations omitted).

In response to this abundant evidence of Congress's intent, petitioner failed to uncover anything in the legislative record to support his reading of § 630(b). 801 F.2d at 272, 273. Because it was undisputed that the Park District had less than 20 employees, the court of appeals affirmed the district court's dismissal of this case. 801 F.2d at 273.

ARGUMENT

This case does not present this Court with a reason to exercise its discretionary power of review. The court of appeals properly decided this case, after a careful consideration of the statutory language and a searching examination of the legislative record. As demonstrated in Part I below, petitioner criticizes the court of appeals solely for referring to Title VII as a guide; this criticism is totally without merit. Furthermore, as discussed in Part II, this case presents an issue of statutory construction which apparently has been raised in only one other federal lawsuit. Because of this dearth of litigation, there is no conflict among the circuits, and the issue in this case is not ripe for this Court's consideration.

I. THE COURT OF APPEALS PROPERLY LOOKED TO TITLE VII FOR GUIDANCE IN INTERPRETING THE 1974 AMENDMENT TO THE ADEA.

Petitioner claims that, under *Lorillard* v. *Pons*, 434 U.S. 575 (1978), the court of appeals should not have looked to Title VII for guidance in interpreting § 630(b), but instead should have looked to the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201, *et seq.* (Pet. 7-11.) This contention is without merit.

Lorillard confirms that the court of appeals properly looked to Title VII in interpreting the extent of the coverage of the ADEA's substantive prohibitions. In *Lorillard*, 434 U.S. at 584, this Court recognized the "important similarities" between the ADEA and Title VII, "both in their aims—the elimination of discrimination from the workplace—and in their substantive prohibitions." While the ADEA incorporated certain remedial and procedural pro-

visions of the FLSA, this Court emphasized that "the prohibitions of the ADEA were derived *in haec verba* from Title VII." *Lorillard*, 434 U.S. at 584-85. Because this case relates to the coverage of the ADEA's substantive prohibitions, and does not raise a question of relief or procedure, *Lorillard* establishes that Title VII was an appropriate source of relevant evidence of Congress's intent.

Furthermore, in extending the ADEA's substantive prohibitions into the public sector, Congress demonstrated that it intended to use Title VII as a model. Congress first considered expanding the ADEA in March 1972, at the same time that Congress was enacting a parallel extension of Title VII. 801 F.2d at 271. The sponsor of the ADEA amendment, Senator Bentsen of Texas, explained that the Senate approved the extension of Title VII because "employees of state and local governments are entitled to the same benefits and protections in equal employment as the employees in the private sector of the economy. . . . I believe that the principles underlying these provisions in the EEOC bill are directly applicable to the Age Discrimination in Employment Act." 801 F.2d at 271, *quoting from* 118 Cong. Rec. 15,895 (1972).*

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* Petitioner also suggests that the court of appeals should have ignored Title VII because Congress supposedly "select[ed] differing authority" as bases for extending the ADEA and Title VII into the public sector. (Pet. 7.) Actually, in *EEOC* v. *Wyoming*, 460 U.S. 226, 243 (1983), this Court upheld Congress's extension of the ADEA under the Commerce Clause, but also expressly reserved the question of whether the ADEA amendment, like Title VII, "could also be upheld as an exercise of Congress's powers under § 5 of the Fourteenth Amendment." Furthermore, petitioner fails to explain how the constitutional basis for Congress's power in extending the ADEA relates in any way to the question of whether the ADEA should apply to all government employers regardless of size.

In addition, even apart from its reliance on Title VII, Congress demonstrated its intent to apply the ADEA's 20-employee minimum in the public sector. For example, when the ADEA amendment was passed in 1974, Senator Bentsen stated that "this measure insures that government employees will be subject to the same protections against arbitrary employment [discrimination] based on age as are employees in the private sector. 801 F.2d at 272, *quoting from* 120 Cong. Rec. 8768 (1974). As the court of appeals observed, the reports of the House and Senate Committees supporting the ADEA amendment consistently echoed the view that the ADEA should be applied in the public sector in the same way that it is applied in the private sector. 801 F.2d at 272.

Petitioner does not dispute the plain import of Senator Bentsen's remarks or the other evidence cited by the court of appeals, and he fails to muster any evidence to support his own contrary position. Instead, petitioner simply claims that the court of appeals should have relied on the FLSA, without explaining how the FLSA could provide any guidance in this case. In fact, the FLSA—unlike both the ADEA and Title VII—has never been limited to employers of a minimum number employees, either in the public or private sector. *See* 29 U.S.C. § 203(d). Therefore, as the court of appeals recognized, "Congress's intent in amending the FLSA has no bearing" on the question of whether the ADEA's 20-employee minimum applies to public employers. 801 F.2d at 271 n.2.

II. THERE IS NO CONFLICT AMONG THE CIRCUITS REGARDING THIS QUESTION OF STATUTORY CONSTRUCTION.

There is no conflict among the circuits to be resolved by this Court in this matter. The unreported decision of the district court in *EEOC* v. *Hudson Township*, No. C 85-2612A (N.D. Ohio 1986) (reprinted as an Appendix hereto), is the only other federal decision which addresses the question raised in this case. This Court generally does not grant certiorari to review a decision of a federal court of appeals merely because it is in conflict with the decision of a district court. Stern, Gressman, Shapiro, *Supreme Court Practice* § 4.8 (6th ed. 1986). *See also* Rule 17(1)(a) of the Rules of the Supreme Court of the United States.

In *Hudson Township*, the district court held that a local government employer with less than 20 employees was subject to the ADEA, but the court reached this conclusion without any reasoning whatsoever. (*See* App. 3.) Indeed, the court in *Hudson Township* did not attempt to analyze the language of § 630(b) or consider the legislative record of Congress's intent. (*Id.*)

Thus, the court of appeals in this case is the only federal court which has analyzed, in a meaningful way, the question of whether Congress intended the ADEA's 20-employee minimum to apply in the public sector. In conducting this analysis, the court of appeals carefully and thoroughly reviewed all of the relevant evidence contained in the legislative record, and reached the only conclusion which is consistent with that evidence. In these circumstances, the issue in this case is not ripe for this Court to exercise its discretionary power of review.

CONCLUSION

For the reasons stated above, this case does not merit review by this Court, and a Writ of Certiorari should not be granted.

Respectfully submitted,

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APPENDIX

DOWD, J.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. C85-2612A

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

vs.

HUDSON TOWNSHIP,

Defendant.

ORDER

The plaintiff, Equal Employment Opportunity Center (hereinafter EEOC), has filed its complaint with this Court alleging that the defendant, Hudson Township, has violated the Age Discrimination in Employment Act (hereinafter ADEA) by engaging in unlawful employment practices with regard to the defendant's alleged refusal to consider for hire, and alleged refusal to hire, Michael Fugo as a full time police officer because of his age. Before the Court is a motion of the defendant, Hudson Township, to dismiss the complaint of the plaintiff, EEOC, pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure. The plaintiff, for its part, opposes the defendant's motion. For the reasons that follow, the defendant's motion to dismiss is denied.

As the basis for its motion, the defendant contends that it is not an "employer" within the meaning of 29 U.S.C. § 630(b) and, therefore, is not amenable to suit under the ADEA. Accordingly, the defendant argues that this Court lacks subject matter jurisdiction over plaintiff's claim. The defendant additionally contends that the entity involved as the prospective "employer" of Michael Fugo is, in actuality, the Hudson Township Police District (hereinafter HTPD) rather than the defendant, Hudson Township.[1] Moreover, the defendant asserts that the HTPD is itself not an "employer" as defined in 29 U.S.C. § 630(b) and hence would also not be subject to the ADEA.

Under 29 U.S.C. § 630(b), the term "employer" for the purposes of the ADEA is defined as follows:

> A person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year: provided, that prior to June 3, 1968, employers having fewer than fifty employees shall not be considered employers. The term also means (1) any agent of such a person, and (2) a state or political subdivision of a state and any agency or instrumentality of a state or a political subdivision of a state, and any interstate agency, but such term does not include the United States, or a corporation wholly owned by the government of the United States.

Defendant argues for a conjunctive reading of § 630(b). That is, the defendant asserts that a "political subdivision of a state" is subject to the ADEA only if such subdivision additionally meets the ADEA's twenty-employee

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[1] The HTPD, not a named defendant in this action, was created by the trustees of the defendant, Hudson Township, pursuant to § 505.48 of the Ohio Revised Code and is a separate political subdivision of the State of Ohio.

requirement. *See, e.g., Kelly v. Wauconda Park District*, 612 F. Supp. 1201 (N.D. Ill. 1985).[2]

This Court, however, rejects such a conjunctive interpretation of 29 U.S.C. § 630(b) in favor of a disjunctive reading thereof. The express language of 29 U.S.C. § 630(b) quite clearly provides three distinct definitions for the term "employer" for purposes of the ADEA. An "employer" under the Act is:

> 1. "A person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year . . . ," or
>
> 2. "Any agent of such a person," or
>
> 3. "A state or political subdivision of a state and any agency or instrumentality of a state or political subdivision of a state. . . ."

See, e,g., Coffin v. South Carolina Dept. of Social Services, 562 F. Supp. 579 (D.S.C. 1983).

It being clear to this Court that the defendant, Hudson Township, is clearly a "political subdivision" of the State of Ohio, said defendant is certainly an "employer" for purposes of the ADEA and is amenable to suit for any violation of that Act.[3] The HTPD is likewise an "em-

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[2] *Kelly* is apparently the only case authority espousing such a conjunctive reading of 29 U.S.C. § 630(b). The Court notes that *Kelly v. Wauconda Park District* is presently being appealed to the United States Court of Appeals for the Seventh Circuit.

[3] Even assuming *arguendo* that the twenty-employee requirement of 29 U.S.C. § 630(b) is applicable to a "political subdivision of a state," the Court finds it notable that the named defendant herein, Hudson Township, has not offered any evidence indicating that Hudson Township fails to employ the requisite number of employees for purposes of the ADEA.

ployer" for purposes of the ADEA[4] and would be equally answerable for any ADEA violation.

As noted previously, the defendant additionally argues that the HTPD was, in actuality, Michael Fugo's prospective employer-in-fact and not the defendant, Hudson Township. The defendant argues that the HTPD is a distinct and separate entity from Hudson Township. Implicit in defendant's contention is that the HTPD is *the* "employer" answerable for any violation of the ADEA in the instant proceeding.

The Court finds that the defendant's argument is without merit and that, indeed, the defendant is an "employer" with respect to the hiring decisions concerning Michael Fugo and any other police officer.[5] It clearly appears from the record, and it is uncontroverted by the defendant, that the Hudson Township trustees:

1. Were and are directly and actively involved in the applicant screening and appointment procedure,

2. Appoint the Chief of Police of Hudson Township pursuant to Ohio Revised Code § 505.49; and

3. Generally adopt rules and regulations implemented for the operation of the HTPD.

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[4] As a "political subdivision of a state" or, alternatively, as an "agency or instrumentality of . . . a political subdivision of a state" (to-wit: Hudson Township).

[5] Even were the defendant, Hudson Township, not directly an employer with regard to such hiring decisions and the employment of police officers, it is apparent to the Court that Hudson Township is nonetheless an "employer" with respect to police employment via its relationship with the HTPD. HTPD is clearly an agent/instrumentality of Hudson Township. *See, e.g.*, Ohio Revised Code § 505.49.

Accordingly, the Court denied the motion of the defendant, Hudson Township, to dismiss this action for lack of subject matter jurisdiction.

IT IS SO ORDERED.

/s/ David D. Dowd, Jr.
U.S. District Judge